No. 89-564

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAURICE AND DOLORES GLOSEMEYER, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS MISSOURI-KANSAS-TEXAS RAILROAD, MISSOURI DEPARTMENT OF NATURAL RESOURCES, *ET AL.*, AND CONSERVATION FEDERATION OF MISSOURI, *ET AL.* TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves some of the same questions pending before this Court in *Preseault v. ICC*, No. 88-1076, argued November 1, 1989, relating to 16 U.S.C. § 1247(d), a statute administered by the Interstate Commerce Commission (ICC) dealing with "railbanking" (preserving rail corridors for future rail use through compatible interim uses). Although both the court of appeals in the underlying decision in *Preseault* and the court of appeals in the underlying decision in the case at bar unanimously determined that 16 U.S.C. § 1247(d) is fully constitutional, they did so for different reasons. The court of appeals in *Preseault* found that 16 U.S.C. § 1247(d) was not a taking. The court of appeals in the case at bar did not reach that issue, instead finding that if § 1247(d) might in some instances result in a taking, just compensation is available under the Tucker Act, 28 U.S.C. § 1491. Because there is no even arguable conflict in the circuits on this latter point, a denial of certiorari is appropriate and not simply a deferral pending the outcome of *Preseault*, as intimated in petitioner Glosemeyer's "Questions Presented." The basic questions presented in this case are as follows:

1. Does Congress lack power under the Commerce Clause to preserve rail transportation corridors for possible future use?

2. Does regulation of rail abandonments by ICC, which regulation routinely frustrates results which otherwise would occur under state law, constitute a "taking" requiring just compensation?

3. Has Congress withdrawn the just compensation remedy provided by the Tucker Act with respect to actions of the ICC regulating rail abandonments?

4. Does a legitimate Congressional rail regulatory purpose (preserving corridors for future use) somehow be-

come noxious when implemented via a compatible interim use (trails) which interim use is subservient to, and finances, preservation of the corridor for future rail use, even though both railroads and trails are "public highways" and mutually subject to regulation as such?

5. Should this Court overturn long-established precedent, specifically confirmed in the rail regulatory context, that the Tucker Act is available unless expressly withdrawn?

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Respondents Missouri-Kansas-Texas Railroad, Missouri Department of Natural Resources, et al.,[1] and Conservation Federation of Missouri, et al.,[2] respectfully request

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[1] The other "State" defendant/appellee below was Frederick Brunner, Director of the Missouri Department of Natural Resources. The current Director of the Missouri Department of Natural Resources is G. Tracy Mehan, III, who should now be substituted as a respondent herein. Sup. Ct. Rule 40.3.

[2] This group of respondents includes National Wildlife Federation, Rails to Trails Conservancy, the Lewis and Clark Nature Trail Foundation, Sierra Club, the Paralyzed Veterans of America, BICYCLE USA (now League of American Wheelmen), the Lewis and Clark Heritage Foundation, American Hiking Society, the Katy Missouri River Trail Association, and American Rivers Conservation Council.

that this Court deny the petition for writ of certiorari sought by petitioners Glosemeyer, et al., seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[3]

STATEMENT OF THE CASE

This case involves the constitutionality of section 8(d) of the National Trails System Act ("Trails Act"), 16 U.S.C. § 1247(d). Section 1247(d) seeks to preserve rail corridors for future rail use (a concept known as "railbanking"). Procedurally, it accomplishes this through permitting ICC to authorize cessation of current rail service obligations while maintaining ICC authority over the corridor to order restoration of rail service. Retention of ICC rail regulatory authority serves, as the statute on its face declares, to preempt state or local law under which parcels in the rail corridor might otherwise revert to adjacent property owners or original grantors. Financially, the statute fosters its railbanking ends by transferring the preservation costs and burdens from the rail carrier to the railbanker (usually a state or local agency, but sometimes a qualified private conservation organization). In order to induce volunteers to assume the preservational costs and burdens, § 1247(d) allows the railbanker to use the corridor as a public recreational trail in the interim—a use compatible not only with restoration of rail service in the future but also consistent with the "public highway" nature of a railroad right-of-way.

A. The Origin of this Case and Petitioner's Claims Here.

This case arises out of a quiet title action filed in Missouri state court, properly removed by the Missouri Department of Natural Resources and Missouri-Kansas-Texas ("Katy") Railroad to federal district court. The

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[3] For ease of exposition, we will refer to petitioners Glosemeyer, et al., in the singular as "petitioner" or "petitioner Glosemeyer" herein.

quiet title proceeding purportedly involved the ownership of interests in a 199-mile long railroad right-of-way, stretching along the Missouri River from Machens (near St. Louis) to Sedalia.[4] This line is a former mainline of the Katy system, now being merged with the Union Pacific/Missouri Pacific system.

Specifically, petitioner Glosemeyer contends that he owns "reversionary" interests in various parcels in the corridor which would have vested in him all interests in these portions of the right-of-way but for the application of 16 U.S.C. § 1247(d). Petitioner did not seek judicial review of the ICC order regulating this corridor under 16 U.S.C. § 1247(d). Under 28 U.S.C. § 2344, applicable pursuant to 28 U.S.C. § 2321, petitioner had only 60 days in which to seek such review. The ICC order is now final and not subject to judicial review. *Telecommunications Research & Action v. FCC*, 750 F.2d 70, 75 (D.C.Cir. 1984). The only issue left to litigate from a collateral attack on an ICC order in state court upon removal to federal district court is the constitutionality of the underlying statute, 16 U.S.C. § 1247(d). *See Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. ——, 107 S.Ct. 1232, 1247 (1987) (sole question on facial challenge is whether the "mere enactment" of statute constitutes a taking).

Petitioner, resigning himself to that issue here, makes what amounts to only a very limited claim against the statute in his Petition for Certiorari. His argument that the statute is unconstitutional rests almost exclusively upon characterizing § 1247(d) in pejorative terms, and asserting that Congress lied when it stated that the statute had a rail regulatory purpose. He says that 16 U.S.C.

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[4] Petitioner Glosemeyer below declined to respond to discovery aimed at establishing an evidentiary basis for the various title claims made in his original complaint. The record is therefore void of any evidentary support for petitioner's broad claims of property interest in this corridor.

§ 1247(d) is a "rails to trails scheme"; he claims it is a land grab for parks; he contends (with no evidence) that none of the lines covered by it will ever be restored for rail use; and he belittles Congress's express declaration of its interest in preserving the corridor for future use. Although the constitutionality of § 1247(d) as applied here is not at issue, he also asserts that the 199-mile former Katy mainline is too junky ever to be restored. On the strength of these pejoratives and allegations of congressional deceit and duplicity, he claims that section 8(d) is a "taking," rather than reasonable regulation, and he argues that the traditional remedy for "regulatory takings"—namely, the Tucker Act, 28 U.S.C. § 1491—has been withdrawn. Petitioner's "facts" are colorful, but self-serving and largely imaginary. Petitioner's conclusions amount to demands that Congress's determinations of transportation policy be second-guessed, not only by petitioner but also by this Court. Petitioner's conclusions about the unconstitutionality of 16 U.S.C. § 1247(d) are accordingly groundless.

B. ICC Authority over Abandonments.

The Interstate Commerce Commission has long regulated all rail abandonments. No abandonment of a rail line in interstate commerce is permissible absent a license from the ICC.[5] Congress, concerned about the system bankruptcies in the 1960's and early 1970's, adopted two major statutes (the Railroad Revitalization and Regulatory Reform Act[6] and the Staggers Act[7]) easing railroads rate regulation and rail line abandonment requirements. Under the impetus of these statutes, ICC has moved away from the principle of "cross-subsidization." This concept, as applied to rail lines, seeks to preserve money-losing

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[5] 49 U.S.C. § 10903-04; *ICC v. Maine Central Railroad Co.*, 505 F.2d 590, 593 (2d Cir. 1974); *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 164-66 (5th Cir. 1966).

[6] 90 Stat. 31.

[7] 94 Stat. 1895.

lines by offsetting losses against profits from money-making lines.[8]

Congress recognized that easing abandonment requirements and moving away from "cross-subsidization" of money-losing lines in order to preserve them would result in an increase in abandonments. Indeed it did. Abandonment approvals jumped from approximately 1000 miles per year to approximately 3000 miles per year. This was cause for concern. The current contraction of the railroad industry may be viewed not so much as a manifestation of historic inevitability, but as a reflection, among other things, of (a) anachronistic cost burdens with which railroads have been saddled and (b) significant tax subsidies enjoyed by competing surface transportation modes. Especially given the well-established recognition that railroads are one of the most environmentally sound, energy efficient forms of surface transportation (45 U.S.C. § 801), it is therefore not implausible to plan for a reinvigoration of the industry in the future. It is certainly not unreasonable at least to preserve the rail option. That is what 16 U.S.C. § 1247(d) is about as much as "trails."

C. Preservation of Rail Corridors.

Consonant with the above, Congress has adopted a variety of measures to preserve rail lines for continued and future use which would otherwise be abandoned under the new policy against cross-subsidization. Consonant with the policy against cross-subsidization, all the measures aimed at corridor preservation impose minimal burdens upon the rail carrier seeking abandonment.

The various measures include 49 U.S.C. § 10905, 49 U.S.C. § 10906, and 16 U.S.C. § 1247(d). Under 49

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[8] An example of a case affirming this approach on abandonment of lines is *Lehigh & N.E. Ry Co. v. ICC*, 540 F.2d 71, 84 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977) (indefinite delay in authorizing abandonment not a taking as long as the railroad's entire operation is not thrown into a loss). As applied to rates, "cross-subsidization" calls for profits on shipments of certain commodities to offset losses incurred in shipments of other commodities.

U.S.C. § 10905, a carrier seeking to abandon a line may be compelled to transfer it to a third party for use as a rail line upon terms and conditions established by the Commission. Similarly, 49 U.S.C. § 10906 authorizes the Commission to bar disposal of lines authorized for abandonment for 180 days unless the lines have first been offered on reasonable terms for public acquisition and use. In both cases, rail preservation is accomplished without cross-subsidization: under § 10905, the Commission requires payment of the constitutionally minimum level of compensation. Under § 10906, the Commission leaves terms of transfer to voluntary agreement.

As a supplement, Congress in early 1983 adopted what at the time was a non-controversial amendment to the National Trails System Act. The amendment, now codified at 16 U.S.C. § 1247(d), is aimed squarely at preserving lines for future rail use ("railbanking"). It provides that the Commission may not authorize abandonment where a state or local government or qualified private organization is willing to bear all the costs, management responsibility and tort liability associated with preserving a line for future use. As an inducement to state and local governments and qualified private organizations to volunteer to shoulder these burdens, the statute permits the railbanking party to use the corridor in the interim as a recreational trail. Again, the statute operates without cross-subsidization. In the past, abandonments were simply denied in order to preserve rail lines for future use, and carriers incurred substantial continuing costs as a result. Alternatively, carriers could relieve themselves of some costs by obtaining a certificate of discontinuance (but not full abandonment), which would preserve the corridor intact, but not relieve the carrier of tax and tort liability.[9] In contrast, 16 U.S.C. § 1247(d)

[9] ICC noted the similarity in application of discontinuance authority and in application of § 1247(d) at 54 Fed. Reg. 8011, 8012-13 (Feb. 24, 1989).

lifted the costs of preserving the lines for future interstate commerce completely from the carriers. The interim trail use serves as a means of financing the preservation. In contrast to the earlier remedies, it preserves corridors without any cross-subsidization from the carrier's other operations.

D. There Is No Conflict in the Circuits.

Petitioner Glosemeyer is adamantly opposed to preservation of rail corridors for future transportation use ("railbanking") and to public use of the corridors in the interim as trails. He contends that 16 U.S.C. § 1247(d) is beyond Congress's power under the Commerce Clause. He dismisses its "railbanking" purpose as contrived, and argues that it is solely for parks and public recreation, which he views as constitutionally illegitimate. In any event, petitioner claims that but for 16 U.S.C. § 1247(d), he would enjoy exclusive use of the surface of his alleged parcels in the right-of-way, and that the statute operates as a "taking" of his "reversionary interests" without just compensation in violation of the Fifth Amendment. The District Court rejected these arguments in *Glosemeyer v. Missouri-Kansas-Texas Railroad*, 685 F.Supp. 1108 (E.D. Mo. 1988), and the Eighth Circuit likewise upheld the statute in *Glosemeyer v. Missouri-Kansas-Texas Railroad*, 879 F.2d 316 (8th Cir. 1989).

To date, no court has embraced the view that section 8(d) of the Trails Act is somehow unconstitutional. All courts which have considered the question have agreed that the statute is within Congress's power under the Commerce Clause. Further, all courts which have considered the question have agreed that even if the statute might in some instance amount to a taking, Congress has impliedly agreed to provide just compensation pursuant to the Tucker Act, 28 U.S.C. § 1491. The United States has agreed that the Tucker Act is available. Petitioner Glosemeyer has not devised any new arguments which

undermine the validity of what Congress has done. There is no conflict in the circuits with regard to the result reached by the Eighth Circuit.

SUMMARY OF ARGUMENT

ICC regulation of rail abandonments necessarily overrides results which would otherwise be applicable under state law. 16 U.S.C. § 1247(d) is part of a family of measures implemented by ICC which aim at preserving corridors for continued transportation use, now or in the future, and for other public purposes even where cessation of rail service is found to be permissible under the longstanding "public convenience and necessity" balancing test. 16 U.S.C. § 1247(d) is well within Congress's power.

16 U.S.C. § 1247(d) serves a legitimate rail regulatory purpose: fostering preservation of corridors for future rail use. The interim trail use with which petitioner takes umbrage is subservient to this purpose. It is there so the preservation may be accomplished without burdening the current rail carrier or current shippers. Given the long-established "public highway" character of railroads, interim use of a corridor as a trail (a form of public highway) in service to the rail regulatory goal of corridor preseravtion is not a taking. In any event, if 16 U.S.C. § 1247(d) in some instance results in a taking, the Tucker Act provides a "just compensation" remedy, as found by the Eighth Circuit and the District Court below.

REASONS FOR DENYING THE WRIT

I. 16 U.S.C. § 1247(d) IS WITHIN CONGRESS'S POWER UNDER THE COMMERCE CLAUSE

Under the Commerce Clause, a statute enacted by Congress must be upheld if it serves legitimate purposes and specifies means which are "reasonable adapted" to achievement of those ends. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). Under this test, Congress clearly has the power to regulate interstate railroads for the current and future public convenience and necessity, and to do so to the exclusion of contrary state law. *See, e.g., Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320, 321 (1981). This power includes the authority to grant or to deny abandonments a state might otherwise handle much differently, with all the consequences to interested parties (the railroad, shippers, reversionary property owners, or the public) and their private agreements which might flow therefrom. *See, e.g., New York v. United States*, 257 U.S. 591, 601 (1922); *Philadelphia, B. & W. R.R. Co. v. Schubert*, 224 U.S. 603, 614-15 (1912); *Louisville & N.R. Co. v. Mottley*, 219 U.S. 467, 481-82 (1911); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 230 (1899); *Moeller v. Interstate Commerce Commission*, 201 F. Supp. 583, 589-90 (S.D. Iowa 1962) (three-judge); *North Carolina v. United States*, 210 F. Supp. 675, 679 (M.D. No. Car. 1962) (three-judge).

Chicago & A. R.R. Co. v. Toledo, P. & W. R.R. Co., 146 ICC 171 (1928), is illustrative and closely on point. The Commission in that case required that a certificate of abandonment be obtained prior to cessation of service even though such cessation was required under the terms of a lease. Citing a passage from *Louisville & N.R. Co., supra*, 219 U.S. at 482, the Commission rejected the contention that the parties' lease was binding for regulatory

purposes. The Commission emphasized that if its jurisdiction over abandonments and discontinuances of service was to be limited or circumscribed by the specific provisions of private contracts, and was to be exercisable only during the life of those contracts, then the Commission's jurisdiction "could be entirely defeated by short-term contracts made renewable at the option of the parties." In short, ICC regulation of abandonments routinely, necessarily and legitimately impacts, regulates, and overrides results which might otherwise obtain under state law.

16 U.S.C. § 1247(d) on its face states that one of its purposes is to preserve rail corridors for future rail use. This is unquestionably a legitimate purpose. *Reed v. Meserve*, 487 F.2d 646, 649-650 (1st Cir. 1973) (preservation of rail corridor for future use is legitimate objective). *See also National Wildlife Federation v. ICC*, 850 F.2d 694, 705 (D.C.Cir. 1988) ("[n]o one doubts that Congress has power" to preserve a rail corridor even if that power is exercised without any rail regulatory purpose). The means selected by Congress to accomplish this end—inducing state and local agencies to voluntarily assume the costs and burdens associated with preserving the corridor for future rail use in return for compatible use in the interim—is manifestly rational.[10]

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[10] A report prepared by two economists for the Iowa legislature rams this point home:

> "The longer the [railroad right-of-way] must be banked before being redeveloped as a railroad or as some other transport corridor, the higher will be the costs and the less the likelihood of the project having a positive net present value. At the same time, if interim uses can be identified and initiated before this redevelopment occurs, the project is more likely to have a positive net present value."

J. Barnard & D. Beckmann, *Feasibility of Land Banking Railroad Right-of-Way* (Legis. Env. Adv. Group, University of Iowa, Jan. 1981), at p. 41. 16 U.S.C. § 1247(d), by linking railbanking with compatible interim use, increases the likelihood that railbanking

Further, by removing the burden of preserving the corridor in the interim from carriers and shippers, the statute is artfully consistent with fostering current as well as future interstate commerce. Under the well-established analysis of Congressional Commerce Clause power, the statute is clearly within Congress's power.

Petitioner Glosemeyer argues that the rail regulatory justifications for 16 U.S.C. § 1247(d) are "valid rationalizations" (Cert. Pet. at 21) and "a transparent attempt to alchemize private property into public hiking and biking trails. . . ." Cert. Pet. at 24. Petitioner's excited rhetoric and pejorative characterizations are a relatively blatant effort to encourage this Court to substitute the judgment of petitioner for that of Congress with respect to national railroad and transportation policies.

Congress declared its railbanking purpose in the statute. The second sentence of 16. U.S.C. § 1247(d) states:

> "Consistent with the purposes of [the Railroad Revitalization and Regulatory Reform Act of 1976], and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any es-

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projects will have a positive net present value and thus will be undertaken. The district court below recognized that 16 U.S.C. § 1247(d) emanates from longstanding congressional concern over rail abandonments and their impact on the interstate rail network. *Glosemeyer v. M-K-T*, 685 F. Supp. 1108, 1115 (E.D. Mo. 1988), citing 90 Stat. 144, 145. Reports indicated that abandonments were running at 3000 miles per year, and were likely to continue at that level or to increase. *Id.* citing U.S. DOT, *Availability and Use of Abandoned Railroad Rights-of-Way* (1977). A major problem in preserving lines through railbanking was, however, financing the management of the corridor without burdening the rail industry which was suffering from low returns and system bankruptcies. 685 F. Supp. at 1115 n.6.

> tablished railroad rights-of-way pursuant to donation, transfer, lease, sale or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration of reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."

This declaration of railroad regulatory purposes is entitled to deference rather than second-guessing. *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 216 (1983). Petitioner cites nothing to suggest that Congress acted illegitimately in declaring its purpose. Instead, petitioner Glosemeyer spins a tale of woe from various ICC statements or actions taken out of context. These upon analysis prove nothing against the statute, and it is the statute which is at issue here.

Petitioner Glosemeyer cites an ICC statement which notes that Congesss was concerned to prevent reversions of rights-of-way while not in current rail service, and implies that ICC acknowledges that this is for recreational and amusement purposes rather than for railbanking. Cert. Pet. at 22. Respectfully, preserving corridors against reversion is what railbanking and the statute are all about. ICC has repeatedly said that the purpose of regulating reversion is to keep the corridor intact for rail purposes. In its decision authorizing cessation of service and application of § 1247(d) below, ICC said: "Congress intended to preempt state property law that would otherwise authorize a reversion of the right-of-way upon discontinuance of service *and thereby preserve transportation corridors for future reactivation of rail service.*" Decision in AB-102 (Sub-no. 13, served March 16, 1987, at p. 7 (emphasis added). It is only coincidental that trail interests are also served.

Petitioner Glosemeyer complains that before ICC applies 16 U.S.C. § 1247(d), it makes a finding that "the right-of-way is *not* necessary '. . . for present *or future* public convenience and necessity.'" Cert. Pet. at 22 (emshasis in original). Petitioner opines that this finding demonstrates that corridor preservation under 16 U.S.C. § 1247(d) is not related to a rail purpose.[11] But petitioner is wrong. ICC's finding goes not to the propriety or desirability of railbanking the right-of-way for future use, but instead goes to the propriety of burdening the rail carrier with those costs. More specifically, under 49 U.S.C. § 10903, ICC necessarily makes a finding, required for all discontinuances of service or abandonments, that cessation of rail service is permissible under "the present or future public convenience and necessity" standard. This standard is the very traditional balancing test weighing the cost to the carrier and interstate commerce of providing current service against the loss to local shippers. *See Colorado v. United States*, 271 U.S. 153 (1926).[12] It has nothing whatsoever to do with the

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[11] Petitioner's complaint relates to ICC's construction of 16 U.S.C. § 1247(d) in unison with 49 U.S.C. § 10903, and not with 16 U.S.C. § 1247(d). If there is an inconsistency in ICC's finding and application of § 1247(d), the remedy lies in a change in ICC's finding, not in declaring § 1247(d) somehow unconstitutional.

[12] This Court articulated the test in *Colorado* as follows:

> "The sole test prescribed is that abandonment be consistent with the public necessity and convenience. . . . The benefit to one of abandonment must be weighed against the inconvenience and loss to which the other will be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. . . . Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the

question whether it would nonetheless be desirable to retain the right-of-way over which the service is provided for possible future use if the retention can be done at no cost to the carrier or shippers. As the First circuit indicated in *Reed v. Meserve, supra,* 487 F.2d at 649-50 (decided long before the advent of various rail corridor preservation measures), there is nothing inconsistent between permitting a carrier to abandon service but nonetheless taking steps to retain a right-of-way for future transporation use through some interim modality.

Petitioner's gambit is a failure for another reason: basic misquotation. What ICC said below was that

> "The present and future public convenience and necessity permit (a) discontinuance of service over; or (b) abandonment of the described line of railroad, subject to the employee protective conditions in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979), *and subject to the directives for implementing interim trail use/rail banking set forth in the orders below.*" [13]

In other words, ICC's finding as to public convenience and necessity in this case was expressly *subject* to a condition which aimed at preserving the corridor for future transportation use without burdening the carrier and current interstate commerce. This is not a renunciation of the corridor as unworthy of railbanking (i.e., future public rail use) as petitioner Glosemeyer is evidently attempting to suggest.

Finally, petitioner Glosemeyer objects that the "national interstate commerce" policy was left to voluntary agreements by the ICC. Petitioner appears to argue that

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Act does not make issuance of the certificate dependent upon a specific finding to that effect."

271 U.S. at 168-69.

[13] Decision and Certificate in AB-102 (Sub-no. 13), served April 27, 1987 (emphasis added) (Appendix A).

such a policy is too fraught with uncertainty, too "left to the whim of trail operators and railroads" (Cert. Pet. at 24), to be meaningful except for recreation. Again, petitioner is way wide of the mark. ICC cannot force a state or local government, or a third party, to step forward to assume the costs of preserving a corridor for future use. Obviously, the state or local agency or private group must volunteer. Moreover, preservation is potentially expensive, and volunteers would be discouraged if the agency did not permit them to abandon the railbank if the costs became prohibitive. The voluntary aspects of ICC's construction of the statute of which petitioner Glosemeyer complains thus help it to work as Congress intended; these aspects do not hinder it or somehow traduce the rail purposes with which it is associated. As to ICC's construction of the statute to require the carrier's voluntary consent, the agency's whole thrust since the mid-1970's has been in the direction of deregulation and voluntarism. Further, this construction does permit each carrier agreeable to railbanking to structure arrangements least burdensome to its operations and thus directly serves interstate commerce purposes.

In any event, this does not mean, as petitioner suggests, that the railbanking policy is so porous—so weak in preservational power—as to be meaningless. Clearly at least some corridors will be preserved for future use which would otherwise be lost. A case in point is the Katy mainline in Missouri—a corridor of potentially enormous future significance. Presumably the reason the petitioner is in this Court is that he feels that statute is a significant factor in preserving a major corridor.

Petitioner Glosemeyer's parting shot is that the statute is "not justifiable as rail regulation under the Commerce Clause" and is purely recreational in nature. Cert. Pet. at 24. Petitioner is just wrong. The railbanking purpose is paramount. The interim trail use is subject to it, and finances it. The corridor remains under ICC authority

for railbanking purposes. That authority is expressly stated in the "certificate of interim trail use" issued with respect to the Katy trail below.[14]

The point can be approached from another angle. As recreational legislation, the statute is subject to downsides more substantial than the purported defects which petitioner coins to undermine it as a rail regulatory measure. In particular, interim trail users are reluctant to invest money in railbanked rights-of-way because they in fact may be restored at some point, perhaps only a few years hence,[15] for rail purposes, and arrangements to work out this concern must be carefully negotiated with rail carriers. But in any event, even if the statute were solely or even predominantly recreational, it is not beyond Congress's power under the Commerce Clause. *See National Wildlife Federation v. ICC, supra.*

Petitioner Glosemeyer also belittles railbanking as applied to the Katy mainline. He claims that it has "no potential" for reactivation because of its "inferiority" as compared to a parallel Missouri Pacific line on the other side of the Missouri River. Cert. Pet. at 24 n.15. Union Electric Company, a major public utility, opposed abandonment of the Katy mainline on the ground that it alone adequately served Union Electric's Callaway nuclear generating facility, that loss of the corridor would hamper transport of heavy transformers to the facility and the construction of a possible additional electrical generating

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[14] The Certificate expressly states that "[i]nterim trail use/rail banking is subject to the future restoration of rail service." Certificate in AB-102 (Sub-no. 13), served April 27, 1987. *See* Appendix A.

[15] According to the *Washington Post*, the Montgomery County (Maryland) Council in the past month has already undertaken to restore rail service in a corridor preserved through interim trail use by means of an ICC order under section 8(d) of the Trails Act, 16 U.S.C. § 1247(d), issued approximately two years ago. *See Wash. Post*, Nov. 29, 1989, A1, p. 1, col. 4.

facility at the site.[16] Preservation of the Katy mainline through interim trail use and railbanking is the least burdensome means available to preserve the corridor to meet Union Electric's possible future railroad needs.[17] Further, several parties have indicated interest in reactivating portions of the line.[18] The line was profitable in 1984, 1985, and in the "base year" calculated for purposes of the application to cease service.[19] Petitioners' pronunciamentos concerning the inapposite nature of railbanking are exercises in fictionalization.

The whole debate on whether the statute is or is not rail regulatory, or sufficiently rail regulatory, goes not so much to Congress's power as to whether the statute is "reasonable regulation" or a "taking"—the Fifth Amendment issue. That issue is treated below.

II. 16 U.S.C. § 1247(d) IS NOT A TAKING WITHOUT JUST COMPENSATION

A. 16 U.S.C. § 1247(d) Is Reasonable Regulation

Reasonable regulation is not a taking. *United States v. Locke*, 471 U.S. 84, 104 (1985); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976); *Village of Euclid v.*

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[16] *See Missouri-Kansas-Texas Railroad Company—Abandonment—in St. Charles, et al., Counties, Missouri*, ICC dkt. AB-102 (Sub-no. 13), served March 16, 1987, at p. 4.

[17] ICC indicated that it was unwilling simply to deny abandonment to retain the corridor on a stand-by basis for Union Electric in light of the utility's "uncertain" needs and the economic burden of refusing to permit cessation of service on the railroad. *Id.* at 5.

[18] *See, e.g., id.* at 7-8.

[19] *Missouri-Kansas-Texas Railroad Company—Abandonment—in St. Charles, et al., Counties, Missouri*, ICC Dkt. AB-102 (Sub-no. 13), served March 16, 1987, at p. 2 ($3,480,195 in profit on $10,572,105 revenue in 1984; $6,052,860 profit on $12,319,883 revenue in 1985; and $5,342,205 profit on $11,770,975 revenue for base year). Two of the five Commissioners voted against cessation of service. *Id.*

Ambler Realty, 272 U.S. 365 (1926). Petitioner Glosemeyer basically argues that 16 U.S.C. § 1247(d) goes beyond the "reasonable" because its rail regulatory purpose is a sham and the statute is just a recreational trail "scheme." As demonstrated in the preceding section, petitioner is in error. The statute has a clear and paramount railbanking purpose. The interim trail use is subordinate to that purpose. In particular, the interim trail use finances the railbanking (rather than vice versa), and any trail is displaced upon orders of the ICC restoring active rail service.[20]

We do not understand petitioner Glosemeyer to contend that preserving a corridor for future use is unreasonable regulation and a taking. Missouri law, like the law of other states which we have examined, recognizes the legitimacy of preserving a rail corridor for future use.[21] The whole thrust of ICC control over abandonments is to postpone abandonment and to preserve a corridor for continued or future use. To claim that such action is a taking is to claim that ICC has been taking reversionary interests in violation of the Fifth Amendment since World War I; it is to claim that the basic legal test for abandonment—which permits ICC to refuse to permit abandonment—is unconstitutional. Petitioner would presumably be satisfied if ICC simply refused to permit an abandonment and consigned the line to become wildlife habitat for an indefinite period. Petitioner's real displeasure with 16 U.S.C. § 1247(d) is that it fosters a use of the

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[20] Under the law of at least some states, railroads are permitted to lease portions of railroad right-of-way easements for non-rail purposes in order to defray costs. *See Martens v. B&O Railroad Co.*, 289 S.E.2d 706, 711-12 (W.Va. 1982).

[21] *E.g., St. Louis-San Francisco Ry Co. v. Dillard*, 43 S.W.2d 1034, 1037 (Mo. 1931) (preserving a right-of-way for future use or growth is a railroad purpose and right-of-way need not be occupied by the railroad until necessary or desirable to do so). *Accord, Hennick v. Kansas City Southern Ry Co.*, 239 S.W.2d 653 (1955).

corridor during the railbank period other than as strictly wildlife habitat.

But this "change"—which is subordinate to restoration for current rail purposes at any time—is not of sufficient significance to render the operation of the statute something other than "reasonable regulation." First, the use in question—trail use—is perfectly consistent with the longstanding status of railroad rights-of-way. Under federal as well as state law, railroad rights-of-way are "public highways."[22] A "trail" is the epitome of a "public highway." Indeed, until the mid-nineteenth century and except for rivers, virtually all "public highways" were once trails. Further, there is no claim that a "trail" is more burdensome than a railroad upon abutting properties. To the contrary, ICC has recently found that there is no evidence of any significant burdens arising from interim trail use of railroad rights-of-way.[23] Further, it is hornbook law that railroads are the most burdensome variety of public highway, cutting off abutter rights of access[24] and commanding exclusive use of the surface estate.[25] If a government requirement of continued rail

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[22] *E.g.*, Missouri Constitution, Art. XII, § 13 (1945) (railroads are public highways); *Southern Railway v. United States*, 222 U.S. 20, 25 (1911) (railroad is a "highway of interstate commerce"); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (railroads are "highways of both interstate and intrastate commerce"); *Cherokee Nation v. Southern Kansas Railway*, 135 U.S. 641, 657 (1890) ("[A] railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends and therefore, subject to governmental control and regulation").

[23] *Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*, Ex parte 274 (Sub-no. 13), served May 26, 1989, at p. 3 n.4, p. 6, p. 6 n.9.

[24] *See* 3 Nichols on Eminent Domain § 10.221 (J. Sackman 3d ed. 1985).

[25] For example, under Missouri law, a railroad's right of possession is "exclusive . . . , and it is only by consent of the company

operation is not an "invasion" of the expectations of the reversionary interest holder, it is hard to see how the lesser "imposition" of preservation for future rail operation is one. *See Nollan v. California Coastal Commission*, 108 S.Ct. 3141, 3147-48 (1987).

Second, federal law as well as the law of many states recognizes an interchangeability of highway uses for various kinds of public highway rights-of-way. For example, federal law expressly permits other kinds of public highways to occupy federally-granted railroad rights-of-way, both before and after cessation of rail use.[26] Interchangeability is also recognized at state law.[27] The basic principle was aptly stated both this decade, and almost 100 years ago, by the Minnesota Supreme Court:

> "The question, then, is what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. . . . [I]t has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired. . . . Another proposition . . . is

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that the owner of the fee in the land can use the surface for any purpose." *Chicago, R.I. & P. Ry Co. v. George*, 145 Mo. 38, 47 S.W. 11, 14 (1898).

[26] 43 U.S.C. §§ 912 & 913.

[27] *E.g., Hatch v. Cincinnati & L.R. Co.*, 18 Ohio St. 92 (1864) (canal to railroad); *Faus v. City of Los Angeles*, 67 Cal.2d 350, 62 Cal. Rptr. 193, 431 P.2d 849 (1967) (railroad to road); *Brainard v. Mississquoi R.R.*, 48 Vt. 107 (1874) (trail to railroad); *Kansas Electric Power Co. v. Walker*, 51 P.2d 1002 (Kan. 1935) (railroad to road: "change in method of transportation and motive power" is not an abandonment); *Anderson v. Knoxville Power & Light Co.*, 16 Tenn. App. 259, 64 S.W. 2d 204, 205 (1933) (track to trackless trolleys); *State ex rel. Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 545, 547 (Minn. 1983), *cert. denied*, 463 U.S. 1209 (1983) (railroad to trail).

> that the public easement in a highway is not limited to travel or transportation of persons or property in movable vehicles."

Haeussler v. Braun, 314 N.W. 2d 4 (Minn. 1981), *quoting Cater v. Northwestern Telephone Exchange Co.*, 60 Minn. 543, 63 N.W. 111, 112 (1885). The case would be different if 16 U.S.C. § 1247(d) provided that railroad rights-of-way could be used in a fashion incompatible not only with railbanking but also with the basic "public highway" nature of the corridor in question. But Congress has not authorized use of the corridors as prisons, or gasoline stations, or video stores. Congress, in a fashion consistent not only with railbanking but also with the public highway character of the corridor, has fostered preservation through a highly compatible and inexpensive interim use. This is not a case of saying "if my aunt were a man, he would be my uncle."[28] It is a case of saying "my aunt is my aunt, whether she is wearing a dress, a skirt, or a pair of blue jeans," or, perhaps more appropriately, "my aunt is my aunt, whether she is driving a car or walking."

Third, the scope of reasonable federal regulation tends to be at its broadest when exercised over railroads and their rights-of-way.[29] Focusing on the rights-of-way themselves, this flows from the fact that those rights-of-way are a unique conglomeration of interests, subject not only to regulation as public highways, but also to federal common carrier regulation under the Commerce Clause. The scope of this regulation extends not only to carrier operations, but to the underlying property and interests therein. *Matter of Boston & Maine Corp.*, 596 F.2d 2, 5-6 (1st Cir. 1979). Private parties granting interests in parcels

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[28] *See* Transcript of oral argument in *Preseault v. ICC*, U.S. Sup. Ct. No. 88-1076, argued Nov. 1, 1989, at p. 37.

[29] *E.g., Southern Railway v. United States*, 222 U.S. 20 (1911); *Houston, E. & W. T. Ry Co. v. United States*, 234 U.S. 342 (1914) (broad construction of congressional power as applied to railroads).

to a railroad for a corridor, even if they purport to restrict their grants to time-limited leases or very narrow easements, implicitly make those grants subject to federal regulation and ICC jurisdiction. *Chicago & Alton R.R. Co. v. Toledo, P. & W. R.R. Co., supra.* As a result, it is well-established that state property law simply does not apply to parcels in the corridor until ICC jurisdiction is ended. *E.g., Mobile & Gulf R. Co. v. Crocker*, 455 So. 2d 829, 832 (Ala. 1984); *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151, 154 (1985).

That certainly is the case in Missouri. In *Kansas City Area Transportation v. Ashley*, 555 S.W. 2d 9 (Mo. 1977), *cert. denied*, 434 U.S. 1066 (1978), the Missouri Supreme Court rejected efforts by a public agency to acquire, under state law, any portion of an unused rail line still regulated by ICC. The Missouri Supreme Court said that "legal abandonment of [a] line of track or discontinuance of service can only be accomplished by the ICC." The court went on to explain that

> "ICC is required to consider a number of factors in arriving at a decision regarding abandonment and is afforded the alternative of allowing another to provide rail service over the line of track . . . or *allow the disposition of the properties for other public purposes*, including mass transportation [citing 49 U.S.C. sec. 1(a)(10), the predecessor of 49 U.S.C. § 10906]."

555 S.W. 2d at 11. ICC jurisdiction—for railroad purposes—has not ended in rights-of-way covered by 16 U.S.C. § 1247(d).

B. In Any Event, A Just Compensation Remedy Is Available

The Court of Appeals below of course did not reach the issue of whether 16 U.S.C. § 1247(d) could ever be a taking, finding instead that just compensation was available. It is again hornbook law that "takings" are not

barred by the U.S. Constitution; the Constitution only proscribes takings without just compensation. That compensation can be paid after the fact as well as before. *Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986, 1016 (1984).

The United States has implicitly promised to pay any required amounts in the event of a "taking" through suits in Claims Court under the Tucker Act, 28 U.S.C. § 1491. The only requirement is that the "taking" be authorized. In the event there is a "taking" of a reversionary interest under 16 U.S.C. § 1247(d), there is no question but that it is authorized. Congress has clearly provided in the second sentence of 16 U.S.C. § 1247(d) that interim trail use and railbanking shall not be considered an abandonment for purposes of any state or local law. The legislative history expressly states that this was intended to regulate state law reversionary interests.[30] ICC's construction of the statute is in accord.[31] Petitioner throughout his Petition for Certiorari emphasizes that this was precisely Congress's intent. In short, all agree that 16 U.S.C. § 1247(d) is being applied to reversionary interests by ICC in accordance with Congress's intent. If this application results in a taking, it is clearly authorized.

It is noteworthy that *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), another railroad case, is the leading decision on this point. In this decision, parties

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[30] H.R. Rep. No. 28, 98th Cong., 1st Sess. 1, reprinted in 1983 U.S. Code Cong. & Admin. News 119.

[31] "As we noted in *Rail Abandonments—Use of Rights-of-Way as Trails*, —— ICC2d ——, slip op. at 9, served May 6, 1986, . . . , Congress intended to preempt state property law that would otherwise authorize a reversion of the right-of-way upon discontinuance of service and thereby preserve transportation corridors for future reactivation of rail service. Allowing reversion of the right-of-way would subvert Congressional purpose in enacting the Trails Act." *Missouri-Kansas-Texas RR—Abandonment—St. Charles, et al. Counties*, AB-102 (Sub-no. 13), served March 16, 1987, at p. 7.

with interests in the Penn Central Transportation Company brought suits contesting the constitutionality of the Regional Rail Reorganization (3-R) Act, 45 U.S.C. § 701, claiming that the statute violated the Fifth Amendment by taking property without just compensation. This Court reiterated the "general rule" that "if there is a taking . . . of property for which there must be compensation under the Fifth Amendment, the [Federal] Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims." 419 U.S. at 126-27.[32] This position has been subsequently reiterated many times by this Court. *Ruckelshaus v. Monsanto, supra*; *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-29 (1985).

Petitioner Glosemeyer argues, however, that Congress has withdrawn the Tucker Act remedy. Petitioner has a heavy burden. Repeals of statutes are disfavored, and this Court has repeatedly indicated that a claimed repeal of the Tucker Act remedy must be express and clear. *E.g.*, *Ruckelshaus v. Monsanto, supra*, 467 U.S. at 1017; *Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 126.

Petitioner's sole argument on the repeal point (*see* Cert. Pet. at 16) is that Congress impliedly withdrew the Tucker remedy via § 101 of Public Law 98-11, reproduced in the notes following 16 U.S.C.A. § 1249. Section 101 states that "authority to enter into contracts and to make payments . . . under [the National Trails System] Act shall be effective only to such extent or in such amounts as are provided in advance in appropria-

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[32] This Court rejected arguments that the Tucker Act is inadequate because Congress may not appropriate the money involved; because the remedy is delayed; and because valuation of railroad property may be complex. 419 U.S. at 148 n.35.

tion Acts." First, this language on its face has no bearing on ICC's administration of 16 U.S.C. § 1247(d). ICC does not enter into contracts or make payments under the National Trails System Act. Its proceedings and activities take place under the Revised Interstate Commerce Act. The language is directed not at regulatory actions, but principally at land acquisitions for the various "national trails" specified in 16 U.S.C. § 1244 by the Secretaries of Interior and Agriculture. Second, to the extent § 101 nevertheless calls for an appropriation in advance, such an appropriation is specifically provided in advance through 31 U.S.C. § 1304, which references, among other things, 28 U.S.C. § 2517, which in turn covers 28 U.S.C. § 1491. Section 101 is quite literally satisfied by the Tucker Act remedy.

Section 101 simply reiterates the constitutional requirement that no money be expended in the absence of an appropriation. U.S. Const. Art. I, § 9, cl. 7. To construe this requirement as somehow withdrawing the Tucker Act remedy is to say, in a reversal of the entire *Regional Rail Reorganization Act* line of cases, that the Tucker Act is not available unless expressly provided for. It would call into constitutional question a host of regulatory statutes.

In the *Regional Reorganization Act Cases* and in *Duke Power Co. v. Carolina Environmental Study Group, Inc., supra*, this Court was faced with two statutes (the 3-R Act and the Price Anderson Act[33]) which set very express limits on the amount of money which could be paid from the Treasury. In each case, this Court held that sums exceeding these amounts would nevertheless be available under the Tucker Act to remedy any constitutional deficiencies resulting from regulatory actions under the statutes. There is far less "evidence" for a withdrawal of the Tucker Act with respect to actions of the ICC un-

[33] 42 U.S.C. § 2210.

der 16 U.S.C. § 1247(d) than there was for such withdrawal under the 3-R Act or Price-Anderson.

Although the United States has consistently taken the position that the Tucker Act is available to remedy any "takings" resulting from application of 16 U.S.C. § 1247(d), no claim has yet been filed by anyone seeking such compensation. The reason is apparent from the history of this case. It was filed not to obtain compensation, but to block preservation of the corridor for the future.[34] While this case was pending below, petitioner and his allies rejected a totally voluntary offer by the Governor of Missouri to cooperate in state legislation to purchase trail easements from them. Petitioner's arguments concerning the unavailability of compensation are contrived and tendered simply to derail the legitimate congressional objective of maintaining rail corridors intact for future use.

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[34] The St. Louis *Post-Dispatch* states that Gary Heldt, one of the Glosemeyer petitioners, indicates that "money is beside the point." The newspaper states that he said, after the *Preseault* oral argument, that "[c]ompensation is not the issue," and that the "landowners" simply want the property. *St. Louis Post-Dispatch*, Nov. 2, 1989, p. 12A.

CONCLUSION

There is no conflict in the circuits with respect to the issues decided by the United States Court of Appeals in its result below. The petition for certiorari should be denied.

Respectfully submitted,

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December 1989

APPENDIX

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INTERSTATE COMMERCE COMMISSION

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-102 (Sub-No. 13)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY—ABANDONMENT IN ST. CHARLES, WARREN, MONTGOMERY, CALLAWAY, BOONE, HOWARD, COOPER AND PETTIS COUNTIES, MO

Decided: April 22, 1987

I have considered the record in this proceeding, including the administratively final decision served and published March 16, 1987, in which applicant was authorized to (a) discontinue service over; or (b) abandon its 199.92-mile line of railroad between milepost 26.92; near Machens and milepost 226.84 near Sedalia, MO. That decision provided that any person, including a government entity, could offer financial assistance to the carrier under 49 C.F.R. 1152.27(c) and 49 U.S.C. 10905 within 10 days of publication of the Commission's finding in the *Federal Register*.

In addition, the decision found interim trail use/rail banking under 49 C.F.R. 1152.29 feasible, and applicant has notified the Commission that it is willing to negotiate an interim trail use agreement.

The time for filing offers of financial assistance has expired without a *bona fide* offer. In absence of an offer and in view of applicant's willingness to negotiate an interim trail use agreement, an appropriate decision and certificate must be entered.

It is certified: The present and future public convenience and necessity permit (a) discontinuance of service over; or (b) abandonment of the described line of railroad, subject to the employee protective conditions in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979), and subject to the directives for implementing interim trail use/rail banking set forth in the orders below.

It is ordered:

1. Subject to any conditions set forth above, the railroad may discontinue service, cancel tariffs for this line on not less than 10 days' notice to the Commission, and salvage track and material consistent with interim trail use/rail banking after the effective date of this certificate. Tariff cancellations must refer to this decision and certificate by date and docket number.

2. In an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and the payment of any and all taxes that may be levied or assessed against the right-of-way.

3. Interim trail use/rail banking is subject to the future restoration of rail service.

4. If the user intends to terminate trail use, it must send the Commission a copy of this certificate and request that it be vacated on a specified date.

5. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this certificate, interim trail use may be implemented. If no agreement is reached by the 180th day, applicant may fully abandon the line.

6. The decision and certificate will be effective 30 days from the date of service.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

NORETA R. MCGEE
Secretary

[SEAL]

Served April 27, 1989.